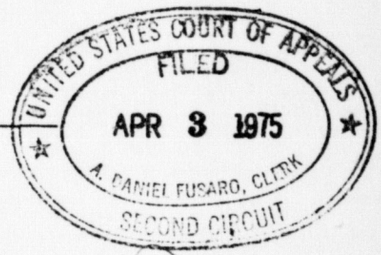
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2548

Docket No. 74-2548
No. 626
Argued 1/9/75
Decided 3/20/75



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN R. PATTERSON, et al.,

Plaintiff-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

- against -

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK ANC VICINITY, et al.,

Defendants-Appellees,

DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors

JAMES V. LARKIN,

Intervenor-Appellant

PETITION FOR A HEARING IN BANC
(RULE 35) AND REHEARING (RULE 40)

BRIEF OF INTERVENOR LARKIN

HERMAN H. TARNOW
Attorney for Intervenor
JAMES V. LARKIN
663 Fifth Avenue
New York, New York

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PRELIMINARY STATEMENT

This is a petition for a hearing in Banc (Rule 35) and a re-hearing (Rule 40) of a decision of this Court dated March 20, 1975, affirming the order of the District Court entered on the 25th day of October 1974.

ISSUED PRESENTED FOR REVIEW:

1. Is it unconstitutional to deny equal relief to similarly situated individuals?

2. Do the findings of fact of the District Court support the conclusion of the Court of Appeals that minorities were the "targets" of racial discrimination?

3. Did the District Court afford the non-minority, non-union employees a full and adequate "hearing" prior to entering its judgment with respect to the settlement agreement?

4. Was the statistical evidence relief upon by the District Court to determine the "goal" of minority employment sufficient and proper?

ARGUMENT

The decision of this Court dated March 20, 1975 does violence to our system's doctrine of equal justice under the law.

It is respectfully submitted that this Court should grant the instant petition and reverse the order of the District Court.

POINT I:

IT IS UNCONSTITUTIONAL TO DENY EQUAL RELIEF TO EQUALLY SITUATED INDIVIDUALS.

The District Court and the Court of Appeals have concluded that the non-union white employees and minority employees were treated identically. They both suffered the ill effects of the discriminatory practices of the union.

> "These intervenors from Group III, as individuals, have also suffered the effects of the union's nepotism;..." (Opinion of the District Court September 19, 1974, p. 18).

> "Larkin's objection to the settlement is premised on the observation that Group III white workers have not benefited from the union discrimination which is the object of this law suit. On the contrary, as Judge Pierce recognized, they too have suffered from union policies which barred Group III workers from access to Group I and permanent jobs." (Opinion of the United States Court of Appeals dated March 20, 1975, p. 2422).

Nevertheless, the Court of Appeals has adopted a position that:

> "In this Title VII action we are limited to a consideration of the fairness of the relief directed only to the later (minority employees). ...The object of Title VII is to 'attack the scourge of racial discrimination'... It creates no rights or benefits in favor of non-minority persons or groups. It is thus apparent that Larkin has no right to any of the affirmative relief afforded to the minority groups,... Our review, therefore, must be limited to the question of whether the settlement agreement in remeding minority discrimination, treats the intervenors fairly." (Opinion p. 2425-2426).

Given the conclusions as noted above that all non-union employees were discriminated against equally it is respectfully submitted that a court of equity must afford equal relief to individuals who are of a similar circumstance. This concept of fairness was expressed by the 6th Circuit Court of Appeals in United States v. Roadway Express, Inc., 457 F. 2d 854 (6 Cir. 1972).

In the instant case, the Court noted that

Roadway "...does not require that a settlement give equivalent benefits to minority and non-minority workers" (2426 FN 4). It is respectfully submitted that a court of equity is "required" to grant equal relief to individuals who have suffered the ravages of discrimination in an equal manner. It is repugnant to a common sense understanding of right and wrong to conclude otherwise.

Indeed the concept of"unequal-but fair"could lead to serious problems in our society. For example, could we not conclude that school children who are given separate but equal schools have been treated fairly? See e.g. Plessy v. Ferguson, 163 U.S. 537 (1896); Contra, Brown v. Board of Education, 347 U.S. 483 (1954).

Query: Has the civil rights movement become so perverted that it no longer sees equality as its guiding light?

POINT II:

THERE WAS NO EVIDENCE THAT GROUP III MINORITIES WERE EVER THE "TARGETS" OF RACIAL DISCRIMINATION.

In its opinion the Court states:

> "...There is evidence that minorities were also discouraged from gaining entrance to Group III lists,..." (p. 2420)
>
> "...Minority members, on the other hand, were the targets of racial discrimination on the part of the virtually all white union." (p. 2425).
>
> "...There was evidence from which it could be inferred that, if there had been no racial discrimination in the industry, more minority persons would have been able to enter Group III and to gain seniority over many whites within Group III." (p. 2430).

Larkin and every other non-union white employee resents and respectfully excepts to the above statements. They simply cannot be supported by the record. For example, at the New York Times approximately 18% of the III List was made up of minority employees.

In fact the District Court in its findings of fact noted:

> "These intervenors from Group III, as indiviauls have also suffered the effects of the union's nepotism;... Certainly this Court does not accept the argument that these particular men have benefited from a discriminatory system." (Opinion of Judge Pierce dated September 19, 1974, p. 18). (Emphasis added).

How then could the Court of Appeals conclude that:

> "...Although Larkin has been the victim of a system which excluded Group III members, minoirty and white, from promotion to Group I, he may well have been the modest beneficiary, vis-a-vis the minority work force, of a policy that discouraged minority persons from entering Group III." (p. 2430-2431)

During the course of the trial below the bulk of the evidence presented in behalf of the government and private plaintiffs was given by white non-union employees. The only"discrimination" found by the District Court concerns itself with the nepotistic policies of the union. Curiously minority union members' sons enjoyed the same preferential treatment as white union sons.

In fact the government in its answer to interrogatories states:

> "Q. Please state whether you are claiming that whites were discriminated against on the basis of non-union membership, nepotism and other preferential systems."
>
> "A. Yes." (Answer to first interrogatories by Michael Devorkin, Assistant United States Attorney, dated May 9, 1974, number 4).

It is respectfully submitted that in light of the statements and the opinions concerning the discriminatory aspects of minority treatment vis-a-vis Group III employment that the Court misapprehended the facts of this case as established during the trial and failed to accept the findings of fact of the District Court.

POINT III:

THE DISTRICT COURT DID NOT AFFORD THE INTERVENORS A "HEARING" ON THE FAIRNESS OF THE SETTLEMENT AGREEMENT.

In its opinion the Court of Appeals notes that there were two hearings with respect to the fairness and adequacy of the proposed agreement. It is respectfully submitted that there was no hearing but rather oral argument with respect to the fairness and adequacy of these agreements and consequently the intervenor was never allowed to present any evidence concerning the sufficiency or fairness of the proposed agreement.

In fact, the intervenor requested a hearing to determine the adequacy not only of the actual agreement but of the size of the goal established therein. The Court refused to grant any such hearing and specifically noted in its order that the matter was to be set down for "argument". Therefore it is respectfully submitted that it was an erroneous finding of the Court of Appeals that there was a "hearing" on the adequacy and fairness of the settlement agreement.

POINT IV:

THE STATISTICAL EVIDENCE SUBMITTED TO SUPPORT THE 25% MINORITY EMPLOYMENT GOAL WAS INSUFFICIENT.

Even the most superficial reading of the statistics submitted by the government in support of its figures to determine the size of the employment goal shows that they cannot be accepted as adequate. For example, the entire County of Westchester is reflected by a figure for the City of Mount Vernon. Furthermore, the government concludes that only low or moderately educated individuals with a background in physical labor could be considered as eligible to be a driver for one of the newspapers. It is respectfully submitted that had a hearing been held to determine the sufficiency of these statistics, it would have been shown that many of the present employees in the delivery department of the newspapers are college educated and indeed reside in Westchester but not necessarily Mount Vernon.

CONCLUSION:

The intervenor cannot stand idly by and accept the fact that this Court is"powerless" to afford him relief equal to that of his fellow employees who have been similarly treated.

In light of the fact that the Court below did enter findings of fact and conclusions of law as well as an "order" it is respectfully submitted that for all of the above reasons this Court should grant a hearing in Banc or a re-hearing and reverse the order of the District Court which approved a discriminatory and unfair system of employment.

Respectfully submitted,

HERMAN H. TARNOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN R. PATTERSON, et al.,

Plaintiffs - Appellees,

-against-

NEWSOPAPER AND MAIL DELIVERERS' UNION OF
NEW YORK AND VICINITY, et al.,

Defendants = Appellees,

JAMES V. LARKIN, et al.

Intervinor - Appellant.

State of New YOrk
County of New York

MARIAN DE ROSA, being duly sworn deposes and says:

1. Deponent is not a party to the action, is over 18 years of age and resides at 12 Warren Street, New York, N.Y. On April 3, 1975 deponent served the Petition for Rehearing upon the Attorneys of Record at the addresses noted by tham for service of papers, by depositing a true copy of same enclosed in a post paid properly addresse wrapper in a official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

New York, N.Y.
April 3, 1975

Marian De Rosa

MARIAN DE ROSA

Sworn to before me
on the 3rd day of
April 1975

H. H. Tarnow

Herman H. Tarnow
Notary Public

☐ INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says, th
deponent is the in the within action; that deponent h
read the foregoing and knows the contents thereof; th
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on informati
and belief, and that as to those matters deponent believes it to be true.

☐ CORPORATE VERIFICATION

deponent is the of the corporati
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matte
therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be tr
This verification is made by deponent because
is a corporation. Deponent is an ofricer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to beforem me, this day of 19 .....

☐ ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State;
shows, that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters there
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Depone
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follo

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

☐ CERTIFICATION BY ATTORNEY

certifies that the within has been compared by the undersigned with the original an
found to be a true and complete copy.

Dated: .....

☐ AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides a

That on the day of 19 deponent served the within
upon attorney(s) fo
in this action, at
the address designated by said attorney(s) for that purpos
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-a post office-offici
depository under the exclusive care and custody of the United States Postal Service within the State o
New York.

☐ AFFIDAVIT OF PERSONAL SERVICE

upon
the herein, by delivering a true copy thereof to h personally. Deponent knew th
person so served to be the person mentioned and described in said papers as the therein
Sworn to before me, this day of 19

.....

among the smaller publishers and distributors. 24 work

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of the within named court

on 19

Dated: 19

Yours, etc.,

HERMAN H. TARNOW

Attorney for

Office and Post Office Address

663 FIFTH AVENUE
NEW YORK, N.Y. 10022

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

HERMAN H. TARNOW

Attorney for

Office and Post Office Address

663 FIFTH AVENUE
NEW YORK, N.Y. 10022

To: Esq.

Attorney for

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Defendants-Appellees,

HERMAN H. TARNOW

Attorney for Intervenor

Office and Post Office Address

663 FIFTH AVENUE
NEW YORK, N.Y. 10022
(212) 355-3977

To: Esq

Attorney for

Service of a copy of the within

is hereby admitted:

Dated, N.Y., 19

Attorney for

States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).